AMALGAMATED TRANSIT UNION, LOCAL 615, Applicant v. CITY OF SASKATOON, Respondent

LRB File No. 210-14; October 21, 2014
Vice-Chairperson, Steven D. Schiefner; Members: Dennis Perrin and Don Ewart

For the Applicant Union: Mr. Gary L. Bainbridge
For the Respondent Employer: Ms. Patricia Warwick

Unfair Labour Practice – Application Pending – City and transit union engaged in collective bargaining – Parties unable to agree on changes to and funding for pension plan for members of union – Parties reach impasse - City issues notice and locks out members of transit union – City also passes bylaw to affect changes to pension plan for members of transit union - Union alleges lockout and changes to pension plan were actions taken contrary to restrictions on industrial action while an application is pending before the Board – Union alleges previously-filed application became pending when Board began considering that application for purposes of summary dismissal – City argues that application had nothing to do with substance of labour dispute and was unaffected by its industrial actions – City also arguing that *in camera* proceedings of the Board are not sufficient to invoke statutory freeze – City argues that to hold otherwise would produce absurd result and permit abuse of statutory scheme - Board reviews circumstances under which "application pending" statutory freeze is invoked – Board satisfied that statutory freeze began when *in camera* panel was asked to determine if disputed application could be determined without the need for an oral hearing – Board concludes that statutory freeze was in place until Board disposed of disputed application – Board finds that City committed unfair labour practice.

***The Saskatchewan Employment Act*, ss. 6-62(1)(l) & 6-111(2).**

REASONS FOR DECISION

Background:

[1] Steven D. Schiefner, Vice-Chairperson: These proceedings were commenced with an application filed with the Saskatchewan Labour Relations Board (the "Board") by the Amalgamated Transit Union, Local 615 (the "Union") on September 22, 2014. In its application,

the Union alleged that the recent actions of the City of Saskatoon (the "City") in locking out members of its transit union and in making changes to the bylaws governing the pensions of those members were in contravention of the statutory freeze set forth in s. 6-62(1)(l)(i) of *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1 (the "*Act*"). The Union alleged that the City was prevented from taking these actions because two (2) applications involving the parties were "*pending*" before this Board within the meaning ascribed to that term by the *Act*. While the City acknowledged that applications involving the parties were before the Board, it disputed that either of these applications were the kind of applications capable of triggering the so-called "application pending" statutory freeze. In the alternative, the City argued that neither of these applications were "*pending*" at any time relevant to these proceedings because no formal hearing had been held into these matters.

[2] The within application was heard by this Board on October 14, 2014 in Saskatoon. On October 17, 2014, the Board issued the following decision:

ORDER

THE LABOUR RELATIONS BOARD, *pursuant to Sections 6-103 and 6-104 of The Saskatchewan Employment Act, finds as follows:*

1. *that application bearing LRB File No. 079-14 was pending before the Saskatchewan Labour Relations Board within the meaning of Section 6-111(2)(a) of The Saskatchewan Employment Act and that said application was pending from the day on which that application was first considered by an in camera panel of the Board on June 3, 2014 until the day on which the decision of this Board was made disposing of that application, being October 3, 2014;*

2. *that the Respondent Employer did unlawfully give notice of its intentions to lockout members of the Applicant Union when an application was pending before the Board in contravention of Section 6-62(1)(l)(i) of The Saskatchewan Employment Act;*

3. *that the Respondent Employer did unlawfully lockout members of the Applicant Union when an application was pending before the Board in contravention of Section 6-62(1)(l)(i) of The Saskatchewan Employment Act;*

4. *that the Respondent Employer did unlawfully make changes to the conditions of employment, benefits and privileges of members of the Applicant Union when an application was pending before the Board in contravention of Section 6-62(1)(l)(i) of The Saskatchewan Employment Act; and*

5. *that the within application is no longer pending before the Board.*

THEREFORE, THE LABOUR RELATIONS BOARD, *pursuant to Sections 6-103 and 6-104 of The Saskatchewan Employment Act,* ***HEREBY:***

6. ***ORDERS*** *the Respondent Employer to cease and desist from its current lockout of members of the Applicant Union and to refrain from declaring another lockout until such time as it has complied with Section 6-34 of The Saskatchewan Employment Act;*

7. ***ORDERS*** *the Respondent Employer to pay compensation to the members of the Applicant Union for monetary loss suffered as a result of the unlawful actions of the Employer in locking out said members while an application was pending before the Board for the period during which the said application was pending before the Board;*

8. ***ORDERS*** *the Respondent Employer and Applicant Union to meet to attempt to resolve quantum of monetary losses arising from the unlawful lockout; failing which either party shall have leave to request the Board reconvene at a set time and place to hear evidence and argument on the issue of quantification of losses occasioned by the lockout;*

9. ***GRANTS LEAVE*** *to the parties to file submissions with the Board on the appropriate relief to be Ordered by the Board, if any, with respect to the enactment of Bylaw No. 9224 of the City of Saskatoon, being The General Superannuation Plan Amendment Bylaw, 2014, and the changes made by the Respondent Employer to the conditions of employment, benefits and privileges of members of the Applicant Union when an application was pending before the Board;*

10. ***RESERVES JURISDICTION*** *to determine:*

    (a) the amount of compensation for monetary loss payable by the Respondent Employer under paragraph 7 above in the event the parties are unable to agree on this issue; and

    (b) the appropriate remedial relief, if any, arising out of the enactment of Bylaw No. 9224 and the changes made to the conditions of employment, benefits and privileges of members of the Applicant Union when an application was pending before the Board.

[3] These are our Reasons for the above captioned decision.

Facts:

[4] The facts relevant to these proceedings are largely not in dispute. Many of the facts involve the Board's own proceedings.

[5] The Union is the certified bargaining agent for all employees of the Transit Branch within the City of Saskatoon (with certain exceptions). The parties have a long history of labour relations and have entered into numerous collective agreements. The most recent agreement between the parties expired on December 31, 2012. The parties exchanged notices and commenced collective bargaining in October of 2013. Although the parties have met on

numerous occasions, they have been unable to agree on the terms of a new collective agreement. The primary issues in contention between the parties are changes to, and funding for, the member's pension plan.

[6] By way of background, members of the Union, together with eight (8) other unions and/or associations representing City employees, are included within the City's General Superannuation Plan. The particulars of this pension plan are currently set forth in Bylaw No. 8226 of the City of Saskatoon, being *The City of Saskatoon General Superannuation Plan Bylaw, 2003*. A recent valuation conducted on the City's General Superannuation Plan found the plan to be significantly under-funded. Although the Union now disputes the accuracy of and assumptions contain in the valuation report, changes to and funding for the City's pension plans became the central feature of collective bargaining with all of the City's unions/associations, including the Union. This particular issue was of sufficient import that all unions/associations agreed to bargain with the City at a common table in an effort to achieve common agreements on these important issues. The result of these negotiations was memorandums of agreement being signed between the City and eight (8) of the nine (9) unions/associations.

[7] While the other unions/associations all agreed to a pension and wage package proposed by the City, the Union did not. The members of the Union have repeatedly voted against acceptance of various versions of the City's offer. The parties have attempted to negotiate a resolution but have been unable to do so. They have utilized the services of a conciliator without success. The City has made two (2) final offers, both of which have been voted down by the membership of the Union. Simply put, the parties are at an impasse and have been at an impasse for months.

[8] By way of further background, on April 22, 2014, the Union filed an application (LRB No. 079-14) with the Board alleging that the City engaged in one or more unfair labour practices involving a member of the Union's bargaining unit. The essence of the allegations in this application are that the City failed to properly investigate an incident that occurred in the workplace involving that member; that the member was initially unfairly disciplined by the City; and that, although the City ultimately agreed to rescind the member's discipline, the member was threatened and/or discouraged by a City official at some point during the process from exercising protected rights. There was no dispute between the parties that the substance of this application was unrelated to the impasse between the parties at the bargaining table.

[9] When the City first received a copy of LRB No. 079-14, it requested further particulars. After considering this request, the Union was directed by the Board to clarify its allegations. On May 6, 2014, the Union provided a letter outlining further and better particulars as to allegations set forth in LRB No. 079-14.

[10] On May 15, 2014, the City filed a Reply to LRB No. 079-14 denying that it had violated the *Act* in any of its dealings with the employee named therein. In addition, the City also filed an application (LRB No. 097-14) seeking to summarily dismiss LRB No. 079-14 on this basis that, even if all of the allegations set forth in that application were assumed by the Board to be true, LRB No. 079-14 did not disclose an arguable case that the City had committed an unfair labour practice.

[11] On May 16, 2014, the Board Registrar provided the parties with the following description of the process the Board would be following in hearing and determining the City's request that LRB File No. 079-14 be summarily dismissed:

> *Good Morning:*
>
> *Further to the electronic confirmation of the Summary Dismissal Application, LRB File No. 097-14, the Board's process does not provide the opportunity to file reply in respect of this type of Application, which only comes later if so invited.*
>
> *The new legislation provides for the application of this nature to be filed, and upon that application, the Board will have an in camera panel only consider the Application for summary dismissal, and the application which is being sought to summarily dismiss, that being LRB File No. 079-14 to be considered. I respectfully refer to the process under the repealed legislation which is being adopted under The Saskatchewan Employment Act.*
>
> *Revised Procedures for Summary Dismissal Applications under The Trade Union Act.*
>
> *As stated in* LRB file Nos. 188-12, 191-12, 192-12, 193-12, 198-12, 199-12, 200-12 & 201-12*, starting at paragraph [85]*
>
> > *[**85**] As noted in paragraph [63] above, there have been some procedural issues surrounding the use of applications for summary dismissal. For the benefit of the Labour Relations community, we believe that it is important that, along with the restatement of the Soles test as outlined above, we provide guidance regarding how an application for summary dismissal should be made.*
> >
> > *[**86**] Given the procedure outlined above, it is clear that the Soles process is intended to be an in camera process, with the first hurdle being a*

> *determination that the matter is one that the Board thinks can conveniently be dealt with in camera. If the Board determines that the matter is not one that can conveniently be dealt with in camera, the application for summary dismissal would require a viva voce hearing before a panel of the Board and the application under s. 18(q) would be dismissed.*
>
> ***[87]*** *However, the practice of some counsel, in simply making reference to summary dismissal in their Reply to the application will no longer suffice to bring the matter before the Board. It will require an additional application (Motion), that will be required to address the facts in support, and the arguments as to why the applicant believes the matter can be dealt with by the Board in camera. So the respondent to that application will be afforded an opportunity to reply to that application, before the matter is considered by an in camera panel for determination. If the Board agrees with the applicant that the matter may be conveniently dealt with in camera, it will then require submissions from the parties on the issue of whether or not the matter in the original matter should be summarily dismissed.*
>
> *[**88**] If the in camera panel determines that the matter is not one that can be conveniently dealt with in camera, then the Board will schedule the application for summary dismissal as a preliminary matter to the hearing of the main application. Alternatively, rather than go through the initial step of requesting the determination regarding summary dismissal to be conducted in camera, the parties may, by additional application (Motion), give notice that they wish to raise the issue of summary dismissal as a preliminary matter at the opening of the main hearing of the matter.*
>
> *[**89**] This process, in our Opinion, creates the necessary separation of the powers given to the Board under s. 18(p) and (q) as noted by Mr. Justice Popescul in Tercon supra.*
>
> *In the meantime, I will place only the application for summary dismissal (LRB File No. 097-14) and the application being sought for dismissal (LRB File NO. 079-14), and the particulars provided to the request for particulars as provided, to an in camera panel. Should that panel determine that the matter does not establish or make out a prima facie case, assuming all the pleadings are factual, then the Application will be considered by a second panel and will then invite and consider the submissions, replies and rebuttal.*
>
> *In the alternative, should the matter not be considered as one to address void of viva voce evidence, the summary dismissal application, LRB File No. 097-14 will be placed before the panel set down for hearing, of LRB File No. 079-14 as a preliminary matter.*
>
> *Thank you and apologies for any confusion the invitation for Reply may have caused…we got slightly ahead of ourselves.*
>
> *Have a good long weekend…*
>
> *F. W. (Fred) Bayer, MBA, CHRP*

[12] On June 3, 2014, the Board Registrar wrote to the parties and advised them that a panel of the Board would be considering the City's application for summary dismissal later that day.

[13] On June 3, 2014, an *in camera* panel of the Board, comprised of Chairperson Love and Board members Hugh Wagner and Al Parenteau, considered the City's application for summary dismissal (LRB No. 097-14), together with the Union's application alleging an unfair labour practice (LRB No. 079-14) and determined that there was no need for the Board to conduct an oral hearing to make a determination on the City's application. Rather, the parties were asked to provide written submissions to the Board on a staggered basis. The Union filed its written submissions on June 13, 2014 arguing that its application, being LRB No. 079-14, should not be summary dismissed. On June 24, 2014, the City filed its submissions in support of its application and in reply to the Union's written arguments.

[14] At the same time as the Board and the parties were dealing with LRB No. 079-14 and LRB No. 097-14, the parties continued to engage in collective bargaining and matters ancillary thereto. For example, on April 8, 2014, the Union sought and obtained a strike mandate from its members. No specific action was taken by the Union on that mandate.

[15] On May 7, 2014, the City proposed a final offer, which was rejected by the membership of the Union on May 9, 2014. In May of 2014, the City requested the assistance of a conciliator. Conciliation took place in June of 2014. However, no agreement was achieved by the parties. Thereafter, the City tabled an enhanced final offer and applied to this Board for a vote on its enhanced final offer. The vote was conducted on August 15, 2014 but was again rejected by the membership of the Union.

[16] On Thursday, September 18, 2014, the City served the Union with notice of its intention to lock out the Union's members (excluding those members specified by the parties in their essential services agreements pursuant to *The Public Services Essential Services Act*, S.S. 2008, c.P-42.2) commencing at 10:00 pm on Saturday, September 20, 2014 if the parties remained at impasse. Thereafter, the parties again engaged in collective bargaining with the assistance of a conciliator. However, the parties were again unable to resolve their differences.

[17] On Saturday, September 20, 2014 at 10:00 pm, the City locked out the non-essential membership of the Union from the workplace affecting some 350 employees. On Monday, September 22, 2014, a special meeting of the City's elected representatives (City Council) was held to consider changes to Bylaw No. 8226, *The City of Saskatoon General*

Superannuation Plan Bylaw, 2003. Bylaw No. 8226 continues and governs the pension plan for all of City employees, including those employees who are members of the Union. The specific changes were set forth in Bylaw No. 9224, *The City of Saskatoon General Superannuation Plan Amendment Bylaw, 2014*. On September 22, 2014, Bylaw No. 9224 was passed by City Council.

[18] As of September 18, 2014 (the date the City gave notice of its intention to declare a lockout), no determination has been made by this Board on application LRB No. 097-14, being the City's application that LRB No. 079-14 be summarily dismissed. The same is true for September 19, 2014, when the City gave notice of its intention to amend Bylaw No. 9226; and for September 20, 2014, when it locked out members of the Union; and for September 22, 2014, when Bylaw No. 9224 was passed by City Council.

[19] On September 22, 2014, the Union filed the within application. In addition, the Union also filed application bearing LRB File No. 211-14, in which the Union sought interim remedial relief from this Board pending the hearing and final determination of this application.

[20] On September 23, 2014, the City withdrew LRB No. 097-14 (its application for summary dismissal of LRB No. 079-14). It also withdrew its Reply to LRB No. 079-14 and admitted to the allegations of wrong doing set forth in that application. The Union responded to the change in the City's position by indicating to the Board that it wanted to be heard on the issue of remedy.

[21] The Union's application for interim relief, being LRB No. 211-14, was heard by the Board on September 26, 2014. Upon hearing from the parties, the Board concluded that the within application demonstrated an arguable case and grant some (but not all) of the interim relief sought by the Union. The Board also directed that LRB No. 079-14 be set down for hearing with respect to the issue of remedy.

[22] On October 3, 2014, the Board heard evidence and submissions from the parties on the issue of the appropriate remedial relief arising out of LRB File No. 079-14. Later that same day, the Board rendered its decision granting much (but not all) of the remedial relief sought by the Union.

[23] On October 17, 2014, this Board issued an Order granting much (but not all) of the remedial relief sought by the Union in the within application.

Relevant statutory provision:

[24] Relevant provisions of *The Saskatchewan Employment Act* include the following:

> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> > *(l) to declare or cause a lockout or to make or threaten any change in wages, hours, conditions or tenure of employment, benefits or privileges while:*
> >
> > > *(i) any application is pending before the board; or*
> > >
> > > *(ii) any matter is pending before a labour relations officer, special mediator or conciliation board appointed pursuant to this Part;*
>
> *. . .*
>
> ***6 –111****(2) For the purposes of this Part:*
>
> > *(a) an application is deemed to be pending before the board on and after the day on which it is first considered by the board at a formally constituted meeting until the day on which the decision of the board is made;*
> >
> > *(b) a matter is deemed to be pending before a conciliation board on and after the day on which the conciliation board is established by the minister until the day on which its report is received by the minister;*
> >
> > *(c) a matter is deemed to be pending before a special mediator on and after the day on which the special mediator is appointed by the minister until the day on which the special mediator's report is received by the minister; and*
> >
> > *(d) a matter is deemed to be pending before a labour relations officer on and after the day on which the labour relations officer is appointed by the director of labour relations until the day on which the labour relations officer's report is received by the minister.*

Applicant Union's arguments:

[25] In argument, counsel on behalf of the Union noted that s. 6-62(1)(l)(i) of *The Saskatchewan Employment Act* prohibits employers from declaring or causing a lockout or making changes to the benefits enjoyed by members of a trade union while "*any application is pending*" before this Board. Counsel further noted that this so called "application pending"

statutory freeze has been in place in Saskatchewan for over 70 years having been introduced in Saskatchewan's very first *Trade Union Act*, S.S. 1944 (2d. session), c. 69, and is now contained in the new *Saskatchewan Employment Act* in essentially the same wording as when originally enacted.

[26] The Union takes the position that the City has committed three (3) unfair labour practices all arising out of industrial actions taken by the City while an application was pending before this Board. Firstly, the Union alleges that the City threatened to change the conditions of employment, benefits and privileges enjoyed by members of the Union during the statutory freeze. Secondly, the Union alleges that the City declared a lockout during the freeze. Thirdly, the Union alleges that the City changed the conditions of employment, benefits and privileges enjoyed by members of the Union.

[27] The Union relies on the decision of this Board in *R.W.D.S.U v. Canadian Linen Supply Co. Ltd.* [1990] S.L.R.B.D. No. 2, LRB File No. 150-89, as standing for the proposition that the meaning of "*any application*" as that term is used in s. 6-62(1)(l)(i) is meant to be broadly applied and that applications are deemed to be pending even if the Board is only dealing with preliminary objections when it first begins "considering" that application.

[28] The Union takes the position that its application bearing LRB File No. 079-14 was "*pending*" before this Board when the City issued lockout notice to members of the Union on September 18, 2014; when it gave notice of pending changes to Bylaw No. 8226 on September 19, 2014; when it locked out members of the Union on September 20, 2014; and when it made changes to the bylaws governing the pensions of member of the Union on September 22, 2014 (the "disputed actions"). The Union argues that LRB No. 079-14 became "*pending*" on June 3, 2014 when an *in camera* panel of the Board began considering the City's application for summary dismissal. The Union argues that this panel of the Board was "*formally constituted*" within the meaning of s. 6-111(2)(a) of *The Saskatchewan Employment Act* and the Union's application was "*first considered*" by the Board at that time, albeit as a preliminary objection. Finally, the Union notes that, as of September 18, 2014 and on each occasion when a disputed action was taken by the City, this Board had not yet rendered its decision on the City's application that LRB File No. 079-14 ought to be summarily dismissed.

[29] The Union argues that the "application pending" statutory freeze remained in effect until October 3, 2014 when this Board rendered its decisions with respect to the disposition of LRB File No. 079-14. The Union takes the position that this statutory freeze was in effect and, thus, the City was prohibited from taking any of the disputed actions. Simply put, the Union argues that the prohibition against industrial action while an application is pending before the Board is clear and has been a long standing component of Saskatchewan's labour relations regime. The Union seeks remedial relief, including a declaratory Order and an Order directing the City to cease and desist from its current industrial actions.

[30] Counsel on behalf of the Union filed written submissions, which we have read and for which we are thankful.

The City's arguments:

[31] The City, on the other hand, takes the position that there was not an "application pending" before this Board within the meaning of s. 6-62(1)(l)(i) of *The Saskatchewan Employment Act* at any time relevant to these proceedings.

[32] Firstly, counsel on behalf of the City noted that an application is only deemed to be "pending" when it is first considered by the Board at a "*formally constituted meeting*". The City argues that this term requires the occurrence of a formal hearing in the presence of the parties. The City takes the position that the *in camera* proceedings of the Board that took place on June 3, 2014 was not a "formally constituted meeting" of the Board because there was no hearing at which the parties were present. For example, the City notes that its Reply (to LRB 079-14) wasn't even considered by the panel at its *in camera* meeting. The City takes the position that there are good policy reasons for excluding *in camera* proceedings from the definition of a "formally constituted meeting"; the main reasons being, so that parties clearly know when the statutory freeze comes into effect and thus can order their affairs accordingly. The City also relies on the decisions of this Board in *Canadian Linen, supra*, and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc.*, [2001] Sask. L.R.B.R. 345, LRB File No. 193-00, as standing for the proposition that the statutory freeze only begins after the commencement of a "hearing" of a matter; not an *in camera* proceeding.

[33] With respect to each of the disputed applications, the City takes the position that LRB No. 097-14 was never considered at a formal hearing of the Board because the City withdrew that application before a hearing of that matter could take place. While the City acknowledges that this application was placed before an *in camera* panel, the City argues that this was not a "*formally constituted meeting*" of the Board and thus LRB No. 097-14 was never a "*pending application*". With respect to LRB No. 079-14, the City takes the position that a hearing into this application did not begin until October 3, 2014 and that this application was not "pending" until well after the City began its industrial action.

[34] Secondly, the City argues that the language contained in s. 6-62(1)(l)(i) is overly broad and must be read down by the Board. Specifically, the City argues that the words "*any application*" as used in this section is simply too broad. For example, the City notes that this section doesn't even limit the prohibition to applications initiated by one of the parties. The City argues that a plain reading of this section could lead to the absurd result wherein an unrelated application, **by an unrelated party**, could be used to invoke the statutory freeze. As a consequence, the City argues that this Board must interpret the provision and, in doing so, must apply an interpretation that is both harmonious with the scheme of the *Act* and consistent with the intent of the Legislature. To which end, the City argues that this provision must be limited to applications that are initiated by one of the parties, as well as to applications that are somehow related to collective bargaining. The City submits that allowing an application that is completely unrelated to collective bargaining to prevent a party from exerting economic pressure through strike or lockout is inconsistent with the purposes of the *Act* and the policy objective of the "application pending" statutory freeze.

[35] The City notes that the interpretation suggested by the Union would prevent parties from exercising their respective economic forces merely because a wholly unrelated matter happens to be before the Board. In this regard, the City notes that all parties agreed that LRB No. 079-14 was unrelated to the matters in dispute between the parties at the bargaining table. The City cautions that applying a broad interpretation to s. 6-62(1)(l)(i) would unnecessarily delay the ability of the parties to exert economic pressure on each other in the event an impasse occurs at collective bargaining. The City argues that the new *Saskatchewan Employment Act* includes a number of new restrictions on strikes and lockouts, including the requirement that the parties engage in mediation or conciliation, together with a fourteen (14) day cooling-off period, before a notice of strike or lockout can be issued. Simply put, in light of

these new restrictions already contained in the new legislation, the City argues that the Legislature could not have intended a broad interpretation of the "application pending" statutory freeze.

[36] The City notes that the policy objective of the "application pending" statutory freeze was set forth by this Board in *Saskatchewan Association of Health Organizations v. Health Sciences Association of Saskatchewan*, (2003) 87 C.L.R.B.R. (2d) 283, 2002 CanLII 52901 (SK LRB), LRB File Nos. 081-02 & 137-02 as being "*to prevent one party from attempting to subvert the access of the other party to the Labour Relations Board by raising the stakes when an application is being brought there*". However, the City argues that its lockout in no way prevents the Union from advancing LRB No. 079-14 or otherwise subverts the Union's access to this Board for purposes of that application. Simply put, the City argues that the mischief that s. 6-62(1)(l)(i) is intended to prevent does not arise in LRB No. 079-14. Rather, the City takes the position that the Union is merely using this provision to prevent the City from engaging in what would otherwise be a lawful lockout based on an application wholly unrelated and unaffected by the current impasse being experienced by the parties in collective bargaining. The City argues that interpreting the provision as broadly as the Union suggests could result in abuse by parties desiring to subvert an opposing party's right to take industrial action by filing frivolous applications with the Board.

[37] With respect to remedy, the City notes that both LRB No. 079-14 and LRB No. 097-14 have now been decided by the Board and that neither of these applications remain pending. As a consequence, the City argues that a restraining Order would be moot and that there is no longer a justification for lifting the City's lockout. With respect to Bylaw No. 9224, the City seeks leave to file further submission in the event the Board concludes that the statutory freeze applied when this Bylaw was enacted.

[38] Finally, the City takes the position that an award of damages would be the only relief appropriate or necessary in the event this Board finds in favour of the Union. In this regard, the City argues that both LRB No. 079-14 and LRB No 097-14 were substantively resolved by September 23, 2014, when the City withdrew 097-14 and its Reply to 079-14. As a consequence, the City argues that damages, if any, should be limited to the period from the commencement of the lockout to September 23, 2014.

[39] The City asks that the Union's application be dismissed. In the alternative, the City argues that remedial relief should be limited to a modest award of damages.

[40] Counsel on behalf of the City filed a brief of law, which we have read and for which we are thankful.

Analysis:

Preface:

[41] We would like to preface our analysis of the matters in dispute in these proceedings by examining the provision that is alleged to have been violated by the City; in this case, the subject provision is s. 6-62(1)(l)(i) of *The Saskatchewan Employment Act*. This provision prevents employers from engaging in certain industrial actions (including declaring a lockout or making unilateral changes in the terms and working conditions for employees) while an application is pending before this Board. It should be noted that this provision has remained largely unchanged since it was first introduced in the 1944 version of *The Trade Union Act*, as s. 8(1)(j). A definition of when an application is deemed to be pending was added to the statute in 1987, as s. 8(3).

[42] Both of these provisions were reproduced in the 1953, 1965 and 1978 versions of *The Trade Union Act*. While these provisions have been moved (and renumbered), the language used by the Legislature to describe the prohibition (and the period during which the statutory freeze applies) has remained essentially unchanged through the seventy (70) year history of *The Trade Union Act*. These provisions are now found in s.6-62(1)(l)(i) and s.6-111(2)(a) of *The Saskatchewan Employment Act*. In our opinion, this Board's jurisprudence on the interpretation and application of the provisions previously contained in *The Trade Union Act* are instructive as to the proper interpretation and application of the provisions now contained in *The Saskatchewan Employment Act*.

[43] Section 6-62(1)(l)(i) makes it an unfair labour practice for an employer to declare a lockout or to make unilateral changes in working conditions while any application is pending before the Board. Pursuant to s. 6-111(2)(a) an application becomes pending when it is first considered by the Board at a properly constituted meeting. Concomitant prohibitions restrain the actions of trade unions when an employer is pursuing its rights before the Board. These restrictions are commonly referred to as the "application pending" statutory freeze.

[44] As noted by Chairperson Bilson in *Saskatchewan Association of Health Organizations v. Health Sciences Association of Saskatchewan,* supra, the policy objective of the "application pending" statutory freeze is "*to prevent one party from attempting to subvert the access of the other party to the Labour Relations Board by raising the stakes when an application is being brought there*". By imposing a statutory freeze while an application is pending before the Board, the Legislature hopes to avoid the potential that an employer or a trade union might try to discourage or punish the other from pursuing an application with the Board by "raising the stakes", so to speak. In the case of s. 6-61(1)(l)(i), the statutory freeze prevents employers from declaring a lockout and from making unilaterally changes in working conditions while an application is pending before the Board. The simplest explanation is that the "application pending" statutory freeze is about protecting the integrity of the Board's processes after we have begun considering an application.

[45] Section 6-62(1)(l)(i) states that "*any application*" is sufficient to trigger the statutory freeze and s. 6-111(2)(a) states that the freeze commences upon this Board's "*first consideration*" of that application at a "*formally constituted meeting*".

Are LRB 079-14 or LRB No. 097-14 the kind of application intended to trigger the statutory freeze?

[46] The City takes that position that no applications were pending before this Board because neither LRB No. 079-14 or LRB No. 097-14 were the kind of applications intended by the Legislature to trigger the "application pending" statutory freeze. In support of this position, the City argues that the language contained in s. 6-62(1)(l)(i) is overly broad and must be read down by the Board. Specifically, the City argues that this provision must be limited to applications that are initiated by one of the parties and that are somehow related to collective bargaining. The City submits that allowing an application that is completely unrelated either to the parties or to collective bargaining to prevent it from declaring a lockout or otherwise exerting economic pressure on the Union is an absurd result; is inconsistent with the purposes of the *Act;* and does not advance the policy objective of the "application pending" statutory freeze.

[47] We agree with the City that the words creating this prohibition must be read in their entire context, in their grammatical and ordinary sense, and in a fashion that is harmoniously with the overall scheme of *The Saskatchewan Employment Act*. We also agree

with the City that the Legislature does not intend to produce absurd consequences in the operation of its legislation. On the other hand, we do not agree that the operation of s. 6-62(1)(l)(i), or its companion provision, 6-111(2)(a), leads to an absurd result in the present proceedings. Firstly, each of the applications relied upon by the Union (to invoke the statutory freeze) were filed by one of the parties. These applications were neither filed by nor do they involve third parties. If the Union had attempted to rely on an application filed by someone other than either the Union or the City, this Board may well have found it necessary to read down the provision to avoid an absurd consequence. However, we are not required to engage in that exercise because the applications relied upon by the Union were both filed by one of the parties. LRB 079-14 was filed by the Union and LRB 097-14 was filed by the City.

[48] Secondly, it is not apparent that the legislature intended the "application pending" statutory freeze to apply only to applications dealing with matters that are the subject of collective bargaining. We are not satisfied that invoking the statutory freeze based on an application arising out of matters unrelated to collective bargaining does produce an absurd result unintended by the Legislature. To the contrary, as was noted by Vice-Chairperson John Hobbs in the *Canadian Linen Supply* case (when the Board examined the provisions creating the statutory freeze contained in the 1978 version of *The Trade Union Act*) "*the most reasonable conclusion is that the legislature intended to cast a wide net*" in drafting these provisions. In other words, the Legislature has made the policy decision that the statutory freeze is invoked by "*any application*" that is pending before this Board. It may well be that the Legislature has cast the net wide in drafting this restriction on an employer's right to declare a lockout or make unilateral changes. However, this is a policy decision of the Legislature that must be respected by the Board. It would be an error of law to read into s. 6-62(1)(l)(i) a requirement that only applications related to collective bargaining are capable of triggering the "application pending" statutory freeze when the Legislature has used such clear language to the contrary.

[49] As we have noted that the underlying policy objective of these provisions is to protect the integrity of the Board's processes after we have begun considering an application. While most applications that are filed with this Board during collective bargaining tend to arise out of collective bargaining, as this case proves, such is not always the case. If the Legislature had intended to limit the operation of s. 6-62(1)(l)(i) in the fashion suggested by the City, it would have said so. There are many legislative restrictions on the right to engage in strikes and lockouts. The "application pending" statutory freeze is one of these restrictions. There can be

little doubt that the Legislature has cast the net wide by using the words "*any application*" in s. 6-62(1)(l)(i). However, as we have indicated, such is a policy decision of the Legislature that must be respected by this Board. It is not for this Board to rewrite *The Saskatchewan Employment Act* in the fashion suggested by the City.

[50] Simply put, we are not satisfied that the Legislature intended to limit the kind of applications that could trigger the statutory freeze to only related matters. Nor are we satisfied that invoking the statutory freeze because an application unrelated to collective bargaining is pending before the Board is inconsistent with the scheme of the Act or produces an absurd consequence. In our opinion, LRB No. 079-14 falls within the meaning of "*any application*" as those words are used in s. 6-62(1)(l)(i) of the *Act*.

When was LRB No. 079-14 first considered by the Board?

[51] We agree with the position advanced by the Union that merely filing LRB No. 079-14 on April 22, 2014 did not invoke the statutory freeze nor did the Registrar's request on May 1, 2014 asking the Union for further particulars. At neither of these points in time had LRB No. 079-14 been presented to a panel of the Board for consideration. We also agree that the statutory freeze was not triggered when the City filed its Reply or when it filed LRB No. 097-14 (its application for summary dismissal) on May 15, 2014. At none of these stages had a panel of this Board been asked to consider either of these applications.

[52] However, the circumstances changed when an *in camera* panel of the Board, comprised of Chairperson Love and Board Members Wagner and Parenteau, was asked to consider LRB No. 097-14. This was a properly constituted panel of the Board at a formally constituted meeting of the Board. Both parties received notice on June 3, 2014 that an *in camera* panel of the Board would be considering the City's application for summary dismissal later that day. The parties were advised that the material to be considered by the Board would include both LRB No. 097 (the City's application for summary dismissal) and LRB No. 079 (the Union's allegation of an unfair labour practice).

[53] LRB No. 097-14 is best described as an interlocutory application arising out of LRB No. 079-14. If granted, LRB No. 097-14 would wholly dispose of the Union's application. It is possible that the Legislature did not intend to include interlocutory applications such as LRB No. 097-14 in the definition of "any application" used in s. 6-62(1)(l)(i) of the *Act*. However, the *in*

camera panel was asked to, and did, consider both LRB No. 097-14 and LRB No. 079-14 on June 3, 2014. The parties were advised by the Board Registrar that both applications would be "considered" by the *in camera* panel on that day. In practical terms, it is difficult to image how a panel of the Board could decide LRB No. 097-14 without considering LRB No. 079-14. In any event, it did consider LRB No. 079-14 when it began its deliberations on LRB No. 097-14 and the parties were advised that the Board would be doing so. Both parties filed written submissions following the Board's initial consideration of these applications and the substance of these submissions was whether or not LRB No. 079-14 contained a fatal flaw sufficient that it ought to be summarily dismissed.

[54] In our opinion, LRB No. 079-14 was first considered by the Board at a formally constituted meeting on June 3, 2014. While 097-14 was also considered by this Board on that date, we make no determination at to whether or not that application alone would have been sufficient to trigger the statutory freeze because that application was not considered alone. It was considered in conjunction with 079-14 and it is this Board's consideration of 079-14 that we find sufficient to trigger the "application pending" statutory freeze.

[55] In coming to this conclusion, we are mindful that there is an argument that pre-hearing processes, such as applications for summary dismissal, should not be sufficient to trigger the "application pending" statutory freeze. When the provisions creating the statutory freeze were introduced into *The Trade Union Act* in 1944, and when these provisions were continued in each of the subsequent revisions of that statute that occurred in 1953, 1985 and 1978, this Board did not have pre-hearing processes. Historically, applications to this Board were first considered at a formal hearing in the presence of the parties. At that time, the term "*formally constituted meeting*" was likely synonymous with a hearing. However, that changed in 2005 when the Legislature amended[1] *The Trade Union Act* and, in doing so, gave this Board the authority to decide matters without holding an oral hearing. In *Beverly Soles v. Canadian Union of Public Employees, Local 4777*, (2006) 129 C.L.R.B.R. (2d) 80, [2006] Sask. L.R.B.R. 413, LRB File No. 085-06, this Board set forth the procedures that were adopted by the Board in exercising this new authority, which procedures including the consideration of applications by *in camera* panels of the Board.

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[1] See: *The Trade Union Amendment Act, 2005*, S.S. 2005, c.30; s.5.

[56] Prior to the 2005 amendment to *The Trade Union Act*, it may well have been arguable that the Legislature did not intend the *in camera* proceedings of the Board to be sufficient to trigger the "application pending" statutory freeze. It is not apparent that *in camera* proceedings by the Board were envisioned by the Legislature prior to 2005. However, after 2005 and certainly in 2013, when *The Saskatchewan Employment Act* was introduced, the fact that this Board utilizes *in camera* proceedings to dispose of application (i.e.: without an oral hearing) would have been well within the knowledge of the Legislature.

[57] The principles of statutory interpretation[2] require this Board to presume that the Legislature had "*perfect knowledge*" when it enacted *The Saskatchewan Employment Act*. In other words, in interpreting enactments, we must assume that the Legislature was aware of this Board's authority, including its authority to decide a matter without holding an oral hearing, and its jurisprudence, including this Board's use of *in camera* proceedings to decide the appropriate disposition of certain applications. These principles of statutory interpretation also require this Board to assume that meaning was intended with the specific words used by the Legislature.

[58] *In camera* proceedings of the Board involve properly constituted panels considering applications at properly constituted meetings. If the Legislature had not intended *in camera* proceedings of the Board to be sufficient to trigger the statutory freeze, it would have said so with express language to that effect when it enacted *The Saskatchewan Employment Act*. Because it did not, this Board must assume that the Legislature intended that the statutory freeze would come into effect on the day on which an application is **first considered** by this Board even if such consideration occurs without an oral hearing by an *in camera* panel of the Board.

[59] In the present case, the City was given notice that on June 3, 2014 a panel of the Board would be considering both LRB No. 097-14 and LRB No. 079-14. If the City had any doubt as to the status of these applications (or any other applications) before the Board, it could have sought clarification from the Board as parties have done in the past.

[60] For the foregoing reasons, we find that LRB No. 079-14 was first considered by the Board on June 3, 2014. We are further satisfied that this was a formally constituted meeting

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[2] Sullivan on the Construction of Statute, Ruth Sullivan – 5th edition.

of the Board; that the parties had notice of this meeting and that matters to be considered at it; and that, upon first considering the application that day, the statutory freeze came into effect.

How Long Was the Statutory Freeze in Effect?

[61] In *Panasiuk v. Service Employees' International Union, Local 299 & Beautiful Plains Villa Ltd.*, [1989] Fall Sask. Labour Rep. 24, LRB File No. 221-88, the Board succinctly concluded that "*an application remains pending until it is either granted or dismissed*". Until then, no decision has been made by the Board and it remains pending. In our opinion, LRB No. 079-14 was an application pending until the day on which this Board disposed of that application on October 3, 2014.

[62] While the City modified its position on September 23, 2014 and arguably did so in an effort to reduce the period during which the statutory freeze would be in effect, in our opinion, it was unsuccessful in doing so. Section 6-111(2)(a) states that an application remains pending "*until the day on which the decision of the board is made*". This Board did not make any decision on LRB No. 079-14 until October 3, 2014. In our opinion, the statutory freeze began on June 3, 2014 when an *in camera* panel of the Board first considered that application and remained in effect until October 3, 2014, the day on which this Board rendered a decision disposing of LRB File No. 079-14.

[63] In coming to this conclusion, we are mindful that the City modified its position on September 23, 2014 and, in doing so, arguably left little in dispute between the parties. We also note that in rendering our decision, the Union was unsuccessful in achieving any remedial relief that was not agreed to by the City. However, in our opinion, s. 6-111(2)(a) is clear as to the period of the statutory freeze and this Board made no decision with respect to the appropriate disposition of LRB No. 079-14 until October 3, 2014. It is the actions of the Board (firstly, in considering an application and then in making a decision on that application) that defines the period of statutory freeze; not the actions of the parties.

Was the Statutory Freeze Violated?

[64] Having found that LRB No. 079-14 was pending before this Board from June 3, 2014 until October 3, 2014, we find that the City undertook a number of actions in contravention of s. 6-62(1)(l)(i). Firstly, on September 18, 2014, the City gave notice of its intention to lockout members of the Union when an application was pending before the Board. Secondly, on

September 20, 2014, when the City locked out members of the Union, that application continued to be pending before the Board. Thirdly, on September 22, 2014, when the City enacted Bylaw No. 9224 that made changes to the conditions of employment, benefits and privileges of members of the Union, the statutory freeze was still in effect. Because an application was pending before this Board, all of these actions were in contravention of s. 6-62(1)(l)(i) of *The Saskatchewan Employment Act* and thus were unlawful.

Remedy:

[65] Having considered the evidence and the argument of the parties, we have determined that the City violated the statutory freeze on industrial action while an application is pending before this Board. As a consequence, appropriate remedial relief must be granted.

[66] Firstly, an Order was issued directing the City to cease and desist from its current lockout of members of the Applicant Union and to refrain from declaring another lockout until such time as it has complied with s. 6-34 of *The Saskatchewan Employment Act*. Simply put, we were not persuaded by the City's argument that a restraining Order would be unjustified in light of this Board's disposition of LRB No. 079-14. The statutory freeze was in effect well before the City began any of the disputed actions it took. In our opinion, s. 6-62(1)(l)(i) rendered unlawful the City's actions in both locking out members of the Union and in giving notice of its intention to do so. We are not satisfied that the subsequently lifting of the statutory freeze (with the disposition of LRB 079-14 on October 3, 2014) cured the unlawfulness of its notices; notices required by s. 6-34 of the *Act*. While we are satisfied that no other applications are currently pending before this Board sufficient to again invoke the statutory freeze (or, if there are such applications pending, the Union is estopped from relying on such applications), in our opinion, if the City desires to continue to lockout the members of the Union, it must start over, including compliance with s. 6-34 of the *Act*.

[67] In its application, the Union seeks compensation for monetary losses suffered by its members as a result of the unlawful conduct of the City. In our opinion, such compensation is appropriate. An Order was issued directing the City to pay compensation to the members of the Union for monetary loss suffered in being locked in contravention of s. 6-62(1)(l)(i) of *The Saskatchewan Employment Act*. However, by agreement of the parties, this Board heard no evidence or argument as to the quantification of such losses other than as to the period of time during which this compensation would be payable.

[68] In our opinion, compensation for monetary losses suffered by members of the Union must be limited to the period commencing with the City's actions in locking out members of the Union on September 20, 2014 until October 3, 2014, when this Board made its decision with respect to the appropriate disposition of LRB No. 079-14. We were not satisfied that compensation for monetary loss is appropriate or necessary for the period after the statutory freeze has been lifted.

[69] The Union also seeks a declaration from this Board that any changes to "wages, hours, conditions or tenure of employment, benefits or privileges" which occurred during the period of the statutory freeze were unlawful. The impugned changes are contained in Bylaw No. 9224 of the City of Saskatoon, being *The General Superannuation Plan Amendment Bylaw, 2014*. While the City disputes that the passage of this Bylaw by City Council resulted in any changes occurring to the conditions of employment, benefits or privileges enjoyed by members of the Union during the period of the statutory freeze, during argument, counsel on behalf of the City asked for leave to file further submissions on this issue in the event we were to find in favour of the City. We agreed with this request and leave was granted to the parties to file submissions to the Board on this issue.

[70] We remain seized and retain jurisdiction with respect to:

(a) the amount of compensation for monetary loss payable by the City, in the event that the parties are unable to agree on this issue; and

(b) the appropriate remedial relief, if any, arising out of the enactment of Bylaw No. 9224 and the changes made to the conditions of employment, benefits and privileges of members of the Applicant Union when an application was pending before the Board.

[71] Finally, and for purpose of clarity, we are satisfied that the within application was no longer pending before this Board as of October 17, 2014, the day on which the decision of this Board was made with respect to the within application.

[72] Board members Don Ewart and Dennis Perrin concur with these Reasons for Decision.

DATED at Regina, Saskatchewan, this **21st** day of **October, 2014.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson